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May 13, 2004

BY HAND DELIVERY (AND FACSIMILE)

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

AOR 2004-18

2004 MAY 13 P 3:15

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Re: Friends of Joe Lieberman

Dear Mr. Norton:

Pursuant to 2 U.S.C. § 437f (2003), this letter requests an advisory opinion from the Federal Election Commission on behalf of Friends of Joe Lieberman ("Requestor"). Requestor asks whether the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, would permit it to purchase books to be used as campaign gifts for supporters under the circumstances outlined below.

FACTUAL DISCUSSION

Requestor is the principal campaign of Senator Joe Lieberman who has filed a statement of candidacy with the Commission as a candidate in 2006 for re-election as a United States Senator from the State of Connecticut. Requestor is raising funds in connection with the 2006 campaign. Requestor would like to purchase books, written by Senator Joe Lieberman, to use as gifts for campaign supporters.

In 1999, Senator Lieberman contracted to write a book entitled "In Praise of Public Life: The Honor And Purpose Of Political Science." Simon and Schuster was the publisher pursuant to a publishing agreement through which Senator Lieberman received a royalty advance (the "Agreement"). Senator Lieberman submitted the Agreement to the United States Senate Committee on Ethics and it was found to be in compliance with Senate Ethics rules. The book has been in publication for several years, and has been sold through hard cover copies, paperback copies and e-books.

The Agreement has a remainder provision that we understand to be customary in the publishing industry, which provides:

Remainder and Salvage Sales

71. When the Publisher in its sole discretion determines that copies of the Literary Work are not readily saleable at regular prices within a reasonable time, the Publisher may remainder copies of the Literary Work (but not earlier than 12 months from the actual publication date of each edition) or dispose of such copies as surplus at the best obtainable price. Notwithstanding anything set forth in this agreement, no royalty shall be payable on copies of the Literary Work sold at a discount of 85% or more from the catalog retail price. Publisher shall make no remainder sale without first offering copies to the Author at the estimated remainder price, provided however, that inadvertent failure to offer such copies to the Author will not be deemed a material breach of this agreement.

Simon and Schuster has notified Senator Lieberman that it has determined that the book is no longer readily saleable and that it intends to dispose of its remaining inventory. Simon and Schuster has offered the Senator the opportunity to purchase the remaining inventory at its "pulp copies" price of \$3.40 per copy ("pulp" copies is the publishing industry term for remaining inventory of books that are no longer deemed marketable). No royalties would accrue to Senator Lieberman for such a sale, as the sale would be a remainder sale for less than 85% of the catalog retail price. Copies of the book purchased by the Committee will not be included in any count that increases or escalates the royalty calculation. Senator Lieberman will not receive any tax or other economic benefit related to the sale.

Simon and Schuster, and counsel with an expertise in the publishing industry, have confirmed that the remainder provision in this contract and pulp copies price are both standard in the publishing industry. It is standard to grant authors the opportunity to buy remainder inventory when the market for the book has terminated. The purchase would be conducted at arm's length, at the price that publishers under normal industry practice make available to authors once the publisher is no longer selling the book to retail markets.

The Requestor would like to purchase some of the remaining inventory of Senator Lieberman's book at the remainder price being offered by Simon and

Schuster. The books would be purchased to use in connection with the Committee's fundraising efforts and as gifts to contributors and supporters. The books purchased by the Committee will be used solely for distribution to campaign supporters and will not be either sold or promoted by the campaign. All books purchased will be used to influence Senator Lieberman's 2006 re-election efforts and the quantities purchased will not exceed the number needed for those campaign purposes.

LEGAL DISCUSSION

The Committee believes that the proposed purchase of books is consistent with the Commission's analysis in Advisory Opinion 2001-8. As in Advisory Opinion 2001-8, the Committee will be purchasing the books for campaign purposes and the Commission has consistently held a candidate and the candidate's committee have wide discretion in making expenditures to influence the candidate's election.

As in Advisory Opinion 2001-8, the Committee will make a bulk purchase of the books at a discount offered through an arms-length transaction. Accordingly, the Committee does not believe that the discount would be deemed an in-kind contribution because the sale would be made at the ordinary and normal charge. The Commission has stated that the term "usual and normal charge" means "the price of those goods in the market from which they would ordinarily would have been purchased at the time of the contribution." Advisory Opinion 2001-8. Thus, the Commission has recognized that the timing is relevant – the normal and ordinary charge can change over time. In the current situation, the normal and ordinary charge may have been higher immediately after the book was published. However, now that the book has been on the market for several years, its value has diminished – indeed, Simon and Schuster has determined that it will no longer be selling the book to retailers and it is looking to dispose of the book through remainder sales.¹ The discount proposed is standard in the publishing industry and is available in the ordinary course and on the same terms to similarly situated people. The discount it is

¹ In addition to being standard in the publishing industry, other Commission regulations recognize that the fair market value of an item generally decreases over time. Thus, for example, in the Commission's regulations concerning donations of polling data has a schedule of time over which the value decreases. Just as the value of a poll decreases, the value of books and other goods decreases when there is not longer a public market for the goods. See also Advisory Opinion 1986-14 (recognizing that Committee assets depreciate)

Lawrence M. Norton, Esq.
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not being extended as a result of Senator's Lieberman's status as a United States Senator or candidate for Senate, and is not being offered as a result of Requestor being a political committee. Thus, Requestor believes that the sale would be consistent with that approved in Advisory Opinion 2001-8.² See also Advisory Opinion 1995-46.

For these reasons, Requestor respectfully requests that the proposed transaction be allowed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Cassandra F. Lentchner". The signature is fluid and cursive, with the first name "Cassandra" and the last name "Lentchner" being more legible than the middle initial "F.".

Cassandra Lentchner

² Similarly, Advisory Opinion 1993-20 supports the validity of the proposed transaction. In Advisory Opinion 1993-20 the Commission concluded "the purchase of goods at a discount does not result in a contribution if the discounted or complimentary goods were available to others on equal terms or as part of a pre-existing business relationship." The proposed transaction meets both these alternatives, it is available to others on equal terms, as well as being part of a pre-existing business relationship.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 20, 2004

Cassandra F. Lentchner, Esq.
Perkins Coie, LLP
607 Fourteenth Street, NW
Washington, DC 20005-2011

Dear Ms. Lentchner:

This letter concerns your May 13, 2004 letter submitted on behalf of "Friends of Joe Lieberman," Senator Joseph Lieberman's committee for re-election to the Senate in 2006 (the "Committee").

In your letter, you ask whether the Committee may purchase remainder copies of Senator Lieberman's book, "In Praise of Public Life," from the book's publisher, Simon and Schuster, at a price of \$3.40 per copy to use as gifts to Committee contributors.

The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. 437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). Further information will be needed for your request to include a complete description of the relevant facts. Please provide responses to the following questions:¹

- 1) Please confirm that the Committee intends to purchase copies of the hardcover edition of Senator Lieberman's book and please provide the "catalog retail price."
- 2) Your letter indicates that no royalties will be paid to Senator Lieberman for the sale of copies of his book to the Committee because Senator Lieberman is not entitled to royalties from any "remainder and salvage sales." Specifically, Paragraph 71 of the Senator's publishing contract, as reproduced in your letter, states that royalties will not be payable to the author for any "remainder" copies sold at a "discount of 85% or more from the catalog retail price." Please explain


¹ A telephone conversation between Brad Deutsch, Assistant General Counsel, Cheryl Hemsley, Attorney, and yourself took place on May 18, 2004, during which the questions contained in this letter were discussed.

how the proposed purchase price of \$3.40 per copy qualifies as a "discount of 85% or more from the catalog retail price."²

3) In your letter, you state that the sale of "remainder" copies of Senator Lieberman's book to the Committee "would be made at the ordinary and normal charge." Accordingly, please provide details regarding any recent sales of "remainder" copies of Senator Lieberman's book by Simon and Schuster, including the quantity sold and the price per copy. Also, please provide an estimate of the number of copies of Mr. Lieberman's book that the Committee anticipates purchasing from Simon and Schuster.

Upon receipt of your responses, this Office will give further consideration to your inquiry. If you have any questions about the advisory opinion process or this letter, please contact Cheryl Hemsley at 202-694-1650.

Sincerely,


Rosemary C. Smith
Associate General Counsel

² We note that the list price for the hardcover edition of Senator Lieberman's book appears to be \$21.00.

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2004 JUN -2 P 4: 37

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2004 JUN -2 P 4: 58

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June 2, 2004

BY HAND DELIVERY (AND FACSIMILE)

Rosemary C. Smith, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Friends of Joe Lieberman

Dear Ms. Smith:

This letter responds to your letter of May 20, 2004 concerning an advisory opinion request on behalf of Friends of Joe Lieberman ("Requestor").

1. In response to question one, Requestor intends to purchase hard cover books and the catalog retail price was \$21.00.
2. In response to question two, Simon and Schuster determined that the remainder price will be \$3.40 per copy price. We have been told that this price was set by the Simon and Schuster business office based on its estimation of the fair market value of the book in what it has classified as a remainder situation. This is the price that Simon and Schuster has proposed selling the book to Requestor and the price at which it intends to sell other copies of the book to other potential buyers. To the extent that the price that Simon and Schuster, in its sole discretion, has determined that the fair market remainder value may minimally exceed the 85% threshold in the remainder provision of the contract, Senator Lieberman will contract with Simon and Schuster to waive any potential royalties or royalty credit. In fact, no royalties would be paid to Senator Lieberman in connection with this transaction because royalty earning sales have not yet exceeded the threshold pursuant to which the Senator is due royalties under the terms of the contract and this purchase will not result in that threshold being crossed. However, to avoid any possible argument of a personal benefit, Requestor intends to complete the sale pursuant to a contract that will provide

Rosemary C. Smith, Esq.
June 2, 2004
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that the Senator will waive any royalty credit accruing to the Senator in connection with this sale.

3. We understand that Simon and Schuster has not yet made any remainder sales, based on the contractual provision that requires it to give Senator Lieberman a right of first refusal before such sales. Requestor intends to purchase a few hundred copies of the book. Simon and Schuster has thousands of additional copies which we have been told it intends to offer for sale at the \$3.40 remainder price to other potential purchasers.

Accordingly, Requestor will be entering into an arms-length transaction and will be purchasing the books at the fair market value. As in Advisory Opinion 2001-8, the Committee does not believe that the discount would be deemed an in-kind contribution because the sale would be made at the ordinary and normal charge made available to others. Under these circumstances Requestor believes that the sale would be consistent with that approved in Advisory Opinion 2001-8.

For these reasons, Requestor respectfully requests that the proposed transaction be allowed.

Very truly yours,


Cassandra Lentchner